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No. 99-1257

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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12 pp

TABLE OF AUTHORITIES

Cases:	Page
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	4
Lead Indus. Ass'n v. *EPA*, 647 F.2d 1130 (D.C. Cir. 1980)	5
Statutes, regulations and rule:	
Clean Air Act, 42 U.S.C. 7401 *et seq.*:	
§ 109, 42 U.S.C. 7409	2, 3
§§ 181-185B, 42 U.S.C.. 7511-7511f	6
§ 307, 42 U.S.C. 7607	9
§ 307(b), 42 U.S.C. 7607(b)	9
40 C.F.R.:	
Section 50.7	7
Section 50.9	8
Section 50.9(b)	7, 8, 9
Section 50.10	7, 8, 9
Fed. R. App. P. 35(a)	2
Miscellaneous:	
62 Fed. Reg. 38,856 (1997):	
p. 38,873	8
pp. 38,884-38,885	7
64 Fed. Reg. 57,424 (1999)	8

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The federal government's petition for a writ of certiorari has prompted an extraordinary array of responses. The Commonwealth of Massachusetts and the State of New Jersey (which have filed their own joint petition, No. 99-1263 (Mass. Pet.)) and the American Lung Association (which has filed its own petition, No. 99-1265 (ALA Pet.)) fully endorse the government's petition. Likewise, the States of New York, Connecticut, Maryland, Maine, New Hampshire, Pennsylvania, Rhode Island and Vermont, as amici curiae (Eastern States Am. Br.), unqualifiedly support review. The State of Ohio does not oppose review of the nondelegation issue, while the States of Michigan and West Virginia support review to the extent urged by the American Trucking Associations, *et al.* (Midwest States Br. 3). The American Trucking Associations, *et al.*, which consists of a group of

industrial interests, says that "[a] properly reformulated version of the Government's first question is worthy of review" (ATA Br. 1; see also Mfrs. Alliance Am. Br. 17). Appalachian Power Co., *et. al.* (APC) and the National Stone Association, *et al.* (NSA), which represent other industrial interests, and the Mercatus Center, an academic organization, oppose review.

As these wide-ranging responses suggest, the court of appeals has decided an extraordinarily important matter. The court ruled that Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, as interpreted by EPA in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter (PM), effects an unconstitutional delegation of legislative authority. Pet. App. 4a. In addition, the court has reached out to decide matters not yet before it and ruled that EPA may enforce the revised ozone NAAQS only "in conformity with" CAA provisions that were enacted to serve a different purpose. *Id.* at 81a. The responses to the government's petition leave no doubt that the challenged rulings, which divided the court of appeals, have great practical importance to the federal and state governments, industry, and the public at large. But of equal moment, those rulings present fundamental issues respecting the power of federal courts and the scope of judicial review. This case clearly warrants the Court's review.

1. The majority of responses to the government's petition agree that this Court should review the nondelegation ruling. That ruling deeply divided the court of appeals—five of the nine judges who participated in the en banc poll voted *in favor* of en banc review. Those judges not only concluded that the ruling raised a question of exceptional importance, see Fed. R. App. P. 35(a), but also condemned the ruling in strong terms, calling it "fundamentally unsound," Pet. App. 92a (Silberman, J., dissenting from denial of rehearing en banc), and a "depart[ure] from a half century of separation-of-powers jurisprudence," *id.* at 99a (Tatel, J., dissenting

from denial of rehearing en banc). Correspondingly, the suggestions by those who oppose review that the court of appeals' decision is actually "unexceptional," "pedestrian" and presents "nothing remarkable" (APC Br. 11, 13, 14) warrant some skepticism.

Although the industrial groups criticize the government rulemaking (and offer less-than-balanced depictions of the government's decision and the rulemaking record, *e.g.*, APC Br. 4-5, 12; ATA Br. 4-7), neither they nor their amici attempt to defend the court of appeals' decision on its own terms. For example, ATA suggests that "a properly reformulated version of the Government's first question"—presumably, as ATA stated it (ATA Br. i)—would be "worthy of this Court's review." *Id.* at 1. But the government's formulation of the question presented (Pet. I) is a virtual paraphrase of the court of appeals' express holding. The court stated, "we find that the construction of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power." Pet. App. 4a. ATA's preferred formulation, by contrast, avoids any mention of the court of appeals' nondelegation rationale. See ATA Br. i; see also Midwest States Br. i; APC Br. i.

There is good reason why respondents are unwilling to defend the court of appeals' holding—that holding is indeed "fundamentally unsound." Pet. App. 92a (Silberman, J., dissenting from denial of rehearing en banc). ATA concedes, and APC does not question, that the CAA "itself" is constitutional. ATA Br. 15 (Section 109 is "undisputedly" constitutional); APC Br. 8 ("The court did *not* hold the statute itself unconstitutional."). To suggest otherwise would truly "depart from a half century of separation-of-powers jurisprudence." Pet. App. 99a (Tatel, J., dissenting from denial of rehearing en banc). But ATA and APC must then face the quandary of explaining how, under the nondelegation doc-

trine, an agency could make an "undisputedly" constitutional statute unconstitutional.

APC and ATA ultimately defend the court of appeals' decision by recharacterizing it. APC suggests that "the constitutional 'nondelegation' rationale for remand in this case might as well have been articulated as 'arbitrary and capricious' agency action" and that the Court should be satisfied with the end result here "[w]hatever the rationale." APC Br. 12, 13 (footnote omitted). ATA argues that the court merely applied "constitutional avoidance and nondelegation principles" as canons of statutory construction and produced an outcome that is "functionally indistinguishable from the work-a-day remands courts issue every time they invalidate an unreasonable agency interpretation under *Chevron* [*U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)]." ATA Br. 10, 14. Those salvage efforts are unavailing.

Contrary to APC's and ATA's suggestions, the rationale of the court of appeals' decision *does* matter. The nondelegation doctrine, the arbitrary-and-capricious standard, and the *Chevron* doctrine each serve a different purpose. They are not interchangeable, and substituting one for the other ignores the logic and diminishes the utility of each. See Pet. 16-17; Pet. App. 94a-96a (Silberman, J., dissenting from rehearing en banc). Moreover, even if rationales were of no moment, the court of appeals' ruling cannot be sustained on either of the bases that APC and ATA suggest.

It is quite clear from the court of appeals' decision that the panel majority did not equate its constitutional analysis with review under the "arbitrary and capricious" standard. The court of appeals noted it had repeatedly held, *under the arbitrary and capricious standard*, that

> when there is uncertainty about the health effects of concentrations of a particular pollutant within a particular range, EPA may use its discretion to make the "policy judgment" to set the standards at one point within the relevant range rather than another. *NRDC v. EPA*, 902 F.2d 962, 969 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Lead Industries [Ass'n* v. *EPA*, 647 F.2d 1130,] 1161 (D.C. Cir. 1980).

Pet. App. 12a. The court imposed a *constitutional* requirement *beyond* what the arbitrary and capricious standard would call for—namely, a "determinate criterion for drawing lines" (*id.* at 6a)—because, in the court's view, "none of those panels [in the previous cases] addressed the claim of undue delegation that we face here." *Id.* at 12a. Plainly, the court ruled that the nondelegation doctrine imposes constitutional imperatives *in addition to* the requirements of the arbitrary and capricious standard. That holding also explains why the court found that it had to postpone a full review of the NAAQS under the arbitrary and capricious standard. *Id.* at 5a.

It is also quite clear that the court of appeals did not employ nondelegation principles merely as a "construction canon[]" (ATA Br. 10) to avoid a constitutional issue. ATA claims that the court "reject[ed] EPA's interpretation under *Chevron*" (*ibid.*), but the panel majority's discussion does not even mention the *Chevron* doctrine, and the panel's opinion on rehearing does so only as an epilogue, suggesting that the agency has discretion on remand to satisfy the court's nondelegation requirement. Pet. App. 75a-76a. Indeed, the panel specifically disclaimed departing from the relevant circuit precedent upholding EPA's interpretive discretion. See Pet. 10 n.4. But more fundamentally, ATA's argument is logically inconsistent. If the relevant provisions of the CAA are "undisputedly" constitutional (ATA Br. 15)—and they are, see Pet. 11-16—then there is no need for a court to invoke the nondelegation doctrine to "avoid" a constitutional issue. The issue before the court of appeals was whether the

agency misinterpreted the CAA or unreasonably exercised the discretion conferred by the CAA. The nondelegation doctrine has no bearing on *those* questions.

In short, APC's and ATA's arguments highlight why the court of appeals' analysis is indefensible. Furthermore, they provide a preview of the Pandora's Box of doctrinal issues that will emerge if the decision is left uncorrected. The Court should therefore grant the government's petition, make clear that the nondelegation doctrine should be confined to its proper role as a separation-of-powers constraint on *Congress*, and remand the case for the court of appeals to analyze the statutory and regulatory issues under the correct legal standards. See Pet. 16-17.

2. APC, ATA, and the Midwest States argue that this Court should not review the court of appeals' further ruling that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2." Pet. App. 81a. As we explain in our petition, Subpart 2 of Part D, Subchapter I of the CAA, 42 U.S.C. 7511-7511f, provides a detailed statutory scheme, including attainment deadlines, for implementing the ozone NAAQS standard that was in effect in 1990. Pet. 4-5, 26. But Subpart 2 does not unambiguously address how to implement the revised ozone standards, which will necessarily require different attainment deadlines and implementation schedules. Pet. 27-29 & n.16; see also Mass. Pet. 5-8, 21-25. The question of how to implement the revised ozone NAAQS should be a matter for EPA and the States to address through authoritative rules that are subject to notice, comment, and judicial review. EPA has not yet conducted those rulemakings, and there was accordingly no occasion for the court of appeals to make broad pronouncements limiting EPA's authority to implement the revised ozone NAAQS. Pet. 19-30.

APC's and ATA's defense of the court of appeals' action demonstrates why the matter warrants this Court's review. They assert that the court of appeals reviewed final and ripe

agency action, but the two sources of supposedly final agency action on which they rely are: (1) EPA's preamble statements responding to industry comments that Subpart 2 provisions *bar* revision of the NAAQS; and (2) a final rule that was *not at issue* in the judicial proceedings below. See APC Br. 22-23; ATA Br. 6, 24, 27-28. If judicial review could be predicated on such bases, there would be an enormous expansion in unfocused challenges to agency regulatory programs and a corresponding expansion in the role of the courts in anticipating and supervising agency activities.

We explain in the petition why preamble statements generally—and especially the preamble statements that the court of appeals relied upon here (62 Fed. Reg. 38,856, 38,884-38,885 (1997))—do not constitute final agency action. Pet. 21-25. EPA has promulgated revised NAAQS that will be implemented through later rulemakings. See 40 C.F.R. 50.7 (revised PM NAAQS); 40 C.F.R. 50.10 (revised ozone NAAQS). Respondents were entitled to challenge the revised NAAQS, and they were entitled to take issue with EPA's reasoning, as expressed in the regulatory preamble, in making those challenges. But EPA's preamble statements are only the agency's explanation of the agency's action—they are not themselves agency actions that are independently reviewable. The court of appeals accordingly had jurisdiction to affirm, set aside or remand the NAAQS, but once it completed that task, it could not go further and decide other issues that were not yet before it. See Pet. 21-25.

In arguing that this rulemaking involves more, APC and ATA point to a rule that EPA issued in the ozone rulemaking, 40 C.F.R. 50.9(b), respecting future enforcement of the 1-hour ozone NAAQS, which the revised 8-hour ozone NAAQS will replace. See APC Br. 23; ATA Br. 27-28. That rule states:

> The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard. Area designations are codified in 40 CFR part 81.

40 C.F.R. 50.9(b). EPA issued that rule to relieve areas that are in compliance with the 1-hour ozone NAAQS from the obligation to comply with both the old 1-hour standard and the new 8-hour standard. See 62 Fed. Reg. at 38,873.[1]

APC characterizes 40 C.F.R. 50.9(b) (incorrectly, see note 2, *infra*) as an "embodi[ment]" of "EPA's legal conclusion" about how the revised ozone NAAQS should be implemented, and it argues that EPA's issuance of that rule therefore subjects "EPA's legal conclusion" to judicial review. APC Br. 23. Respondents fail to reveal, however, that *no one* challenged the validity of 40 C.F.R. 50.9(b), which was a minor component of the ozone rulemaking. The court of appeals did not review, or even mention, that rule. Hence, the rule was certainly not the actual predicate for the court of appeals' ruling.[2]

The court of appeals was entitled to rule on how "EPA can enforce a revised primary ozone NAAQS" (Pet. App. 81a) only if the parties had placed before the court a specific challenge to final agency action enforcing that NAAQS. No such challenge had been presented, and there accordingly was no basis for the court to address that question. Its overreaching cannot be justified by post hoc resort to the

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[1] As a consequence of the court of appeal's decision, EPA has proposed a modification of 40 C.F.R. 50.9(b) to maintain the 1-hour standard in effect until the ongoing legal challenges are resolved. See 64 Fed. Reg. 57,424 (1999).

[2] An additional problem with respondents' argument is that 40 C.F.R. 50.9(b) is part of, and addresses enforcement of, the *old* ozone NAAQS. Compare 40 C.F.R. 50.9 with 40 C.F.R. 50.10. Accordingly, it is not accurate to characterize 40 C.F.R. 50.9(b) as implementing or enforcing the revised ozone NAAQS. The rule deals with only one aspect of the transition from the old ozone standard to the new ozone standard.

undiscussed implications of an unchallenged rule. That is particularly true where that rule merely addresses interim enforcement of the *pre-existing* NAAQS.[3]

APC's reliance on 40 C.F.R. 50.9(b) would make sense only if this Court accepted the contention that judicial review is available on an open-ended basis whenever the agency expresses a "legal conclusion" somewhere in the rulemaking proceeding. Under that view, the party would not be required to challenge the particular rule that allegedly "embodied" that conclusion—it would be enough for the party simply to take issue with the agency's general view of its regulatory authority. See APC Br. 23; see also ATA Br. 27-28. That approach to administrative finality and ripeness is clearly unsound. The CAA predicates judicial review on challenges to final agency action. See CAA § 307(b), 42 U.S.C. 7607(b). It does not give the courts unrestricted license to critique regulatory preambles or to review the general legal perspectives allegedly "embodied" in unchallenged regulations.

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[3] Significantly, APC could have challenged 40 C.F.R. 50.9(b) in the proceedings below, and it should have if it disagreed with that rule. But APC did not do so because the rule is in industry's interest—the rule reduces the regulatory burden on ozone sources. Since that time, an environmental group has brought a challenge to 40 C.F.R. 50.9(b), and the government opposed that challenge because it was untimely. See *Environmental Defense Fund (EDF)* v. *Browner*, No. 98-1363 (D.C. Cir.). Contrary to APC's assertion (APC Br. 24), the government's position there is consistent with its position here. Any petitions to review 40 C.F.R. 50.9(b) should have been brought within 60 days of promulgation of the final rule. See 42 U.S.C. 7607. Neither EDF nor APC nor anyone else brought a timely judicial challenge to 40 C.F.R. 50.9(b). Rather, APC and others brought a timely judicial challenge to the revised ozone NAAQS, 40 C.F.R. 50.10. The latter challenge put before the court the question whether to affirm, invalidate, or remand the revised ozone NAAQS, but it did not entitle the court to address the subjects of future rulemaking—including how the revised ozone NAAQS would eventually be enforced.

This Court therefore should grant review on the Subpart 2 issues. In our view, the better course is to set aside on finality and ripeness grounds the court of appeals' ruling limiting what actions EPA may take in future rulemakings. But if the Court reaches the merits, there is ample reason to declare the ruling wrong as a matter of law. See Pet. 27-30; Mass. Pet. 21-25; ALA Pet. 24-26; Eastern States Am. Br. 6-11. This Court's resolution of the matter is warranted based on its practical importance to the federal government and the States. The Court's review takes on added importance in light of APC's incongruous interpretation of the court of appeals' obscure statement that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2" (Pet. App. 81a). In APC's view, that statement means that EPA can promulgate—but not enforce—a revised ozone NAAQS.[4]

For the foregoing reasons and the reasons stated in the petition for a writ of certiorari, the petition should be granted and consolidated with the petitions in No. 99-1263 and No. 99-1265.

Respectfully submitted.

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[4] Notwithstanding the panel's revisions of its opinion (Pet. App. 79a-82a) and Judge Tatel's explanatory concurrence (*id.* at 89a), APC asserts that Subpart 2 "must preclude the EPA from requiring areas to comply either more quickly *or with a more stringent ozone NAAQS*." APC Br. 9, 28 (quoting panel opinion, emphasis supplied by APC). APC's interpretation of the court's ruling would transform the promulgation of that NAAQS and judicial review of its promulgation into largely academic exercises.